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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LESLEY ZHU,

Movant,

v.

RETROPHIN, INC.,

Respondent,

Case No. 2:19-mc-00137-JAK (AGR)

RESPONDENT RETROPHIN, INC.'S OPPOSITION TO LESLEY ZHU'S UNTIMELY MOTION TO QUASH AND CROSS-MOTION FOR AN ORDER TO SHOW CAUSE WHY SHE SHOULD NOT BE HELD IN CONTEMPT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

DATE: AUG. 5, 2019 (RETROPHIN CROSS-MOTION RE CONTEMPT); NOV. 18, 2019 (ZHU MOTION TO QUASH)
TIME: 8:30 AM
COURTROOM: 10B
JUDGE: HON. JOHN A. KRONSTADT

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Pursuant to Rules 45 (f) and (g) of the Federal Rules of Civil Procedure and Rule 45 of the Local Rules of this Court, Respondent Retrophin, Inc. ("Retrophin") respectfully submits this Memorandum of Points and Authorities in support of its Opposition to Lesley Zhu's Untimely Motion to Quash the Subpoena Ad Testificandum and in support of its Cross-Motion For an Order to Show Cause Why She Should Not Be Held in Contempt of Court for failure to attend a deposition properly noticed by a Subpoena to Testify at a Deposition in a Civil Action, served on June 17, 2019.

For the reasons set forth below, the Court should deny Zhu's motion to quash and order Zhu to appear and testify at a deposition at Cooley LLP, 1333 2nd St, Suite 400, Santa Monica, CA 90401, at a date ordered by the Court, or at such time and place as may be agreed by the parties, and to show cause, as promptly as the Court's schedule allows, as to why the Court should not hold her in contempt.

This opposition and cross-motion is made following the conference of counsel pursuant to L.R. 7-3, which first began on June 19, 2019.

MEMORANDUM OF POINTS AND AUTHORITIES

Retrophin respectfully opposes Zhu's Motion to Quash[1] and requests that this Court order her to comply with a Subpoena issued in connection with *Spring Pharmaceuticals, Inc. v. Retrophin, Inc. et al*, 2:18-cv-04553-JCJ (E.D. Pa.), and to hold her in contempt and issue sanctions as the Court finds just and reasonable.

PRELIMINARY STATEMENT

Respondent Retrophin served Petitioner Lesley Zhu ("Zhu") personally with a subpoena that properly commanded her to appear for a deposition on June 28, 2019. At one minute before 5:00 pm Pacific Time on the evening of June 27, when she was sure the Court would not have time to reject her motion before the deposition, and after counsel for Retrophin had already traveled from New York to Los Angeles to take the deposition, she filed a motion to quash. As set forth in detail below, the motion does not articulate any valid basis to quash the subpoena. She then failed to appear at the deposition, thus flagrantly disobeying a validly issued subpoena. By deliberately waiting until the close of business the night before the scheduled deposition to move to quash, Zhu sought to grant herself the relief she seeks from the Court by *fait accompli*, and to ensure that her deposition would never be taken, knowing that the jurisdictional discovery phase for which her deposition is sought is set to close in one week. This court should not tolerate this "Rambo" litigation tactic. Zhu's untimely and meritless motion to quash should be denied and she should be ordered to appear for a deposition and to show cause why she should not be held in contempt of court for flagrant, inexcusable disobedience of a clear court order.

This opposition and cross-motion arises in connection with an antitrust case pending in the United States District Court for the Eastern District of Pennsylvania,

[1] With respect to Zhu's Motion to Transfer its Motion to Quash to the United States District Court for the Eastern District of Pennsylvania, Retrophin does not object to such transfer, so long as it does not result in further delay of the resolution of the issues raised in the Motion to Quash and Retrophin's Opposition, and subject to this Court retaining jurisdiction as needed to enforce orders against Zhu.

Spring v. Retrophin, et al. The plaintiff is a limited liability company (LLC), going by the name Spring Pharmaceuticals, LLC ("Spring"), founded by an antitrust lawyer at Winston & Strawn (Spring's current litigation counsel), Jialue Charles Li. Li had the LLC formed a matter of months before Spring filed its complaint, in which Spring alleges that it is a generic pharmaceutical company seeking to produce a generic version of the branded drug Thiola, which is sold by Retrophin. Spring claims it has been prevented from competing because it is unable to obtain samples of Thiola, which are necessary for it to perform bioequivalence testing on its generic drug (once developed) as required to obtain expedited FDA approval.

The court ordered early discovery to determine whether Spring has suffered an injury-in-fact sufficient to confer Article III standing. Discovery produced by Spring indicated that Prinston Pharmaceutical, Inc. ("Prinston") and Zhu, an employee of Prinston, likely were in possession of critical information as to Spring's Article III standing. Specifically, as set forth below, in early 2018 Spring and Prinston (led by Zhu) entered into negotiations for Prinston to manufacture a generic version of Thiola. Prinston ultimately declined to work with Spring, but before it did so, it identified a potential source of samples of Thiola—the very thing Spring claims it needed, but could not obtain, in order to compete. Accordingly, in addition to discovery requests served on Spring and other nonparties, Retrophin issued a Document Subpoena to Prinston, and a Deposition Subpoena to Zhu.

Retrophin opposes Zhu's Motion to Quash (Part I) and seeks an order compelling Zhu to appear for a deposition and for an order to show cause as to why Zhu and her counsel should not be held in contempt for violation of a clear court order (Part II).

RELEVANT FACTUAL BACKGROUND

On October 23, 2018, Spring filed a complaint against the Defendants in the above-captioned matter, asserting antitrust violations. Specifically, it alleged that Spring purportedly desires to bring to market a generic version of tiopronin, which Retrophin sells under the brand name Thiola. Spring alleges that it cannot bring a

generic version of tiopronin to market because it is unable to acquire samples of Thiola that it needs in order to conduct the "bioequivalence" testing required to obtain expedited FDA approval. Exhibit A, *Spring v. Retrophin*, Dkt. 1.

On January 15, 2019, the Defendants moved to dismiss the Complaint pursuant, among other things, to Federal Rule of Civil Procedure 12(b)(1), on the grounds that Spring lacks Article III standing because it has not suffered an injury-in-fact. The Defendants made a "factual attack," establishing with supporting evidence that Spring, which, as noted, was founded by an antitrust attorney at the law firm representing it in this litigation (Winston & Strawn), is a made-for-litigation company that had neither the intention nor the ability to produce a generic version of Thiola—even with access to Thiola samples. Exhibit B, *Spring v. Retrophin*, Dkt. 42-1 at 9-14.

On April 10, 2019, Judge Joyner in the District Court for the Eastern District of Pennsylvania stayed the Defendants' motions to dismiss for ninety days to allow for discovery on the question "of whether Plaintiff Spring has standing to sue under Article III." Exhibit C, *Spring v. Retrophin*, at Dkt. 52 ("Order") at 18. The discovery period ends on July 8, 2019.

The question of Article III standing comes down to whether Spring suffered injury-in-fact traceable to the Defendants' alleged conduct. Central to that question are two issues: (1) whether Spring would or could have entered the market, and (2) relatedly, whether Spring was in fact unable to obtain the samples it says it needed, as it claims. Evidence produced by Spring shows that Prinston, and in particular, Zhu, are likely to be in possession of highly critical evidence on both of these topics. Prinston is in the business of developing and manufacturing drugs, and Spring contacted Prinston, purportedly to engage Prinston as a subcontractor. [redacted]

[redacted] Plainly, if Spring in fact had access to Thiola samples, it could not have been injured by Defendants' alleged conduct and would lack Article III standing.

[redacted] Zhu may have a better (or more honest) recollection of these events, and her testimony as to whether samples could have been obtained and as to whether Li demonstrated any interest in obtaining them would be critical evidence as to Spring's Article III standing.

[redacted] The reasons for Prinston's decision to discontinue its work with Spring are also likely highly material to the question of Spring's Article III standing. Prinston's counsel has represented, for example, that Prinston declined the project because it was too difficult and expensive. Declaration of Philip Bowman In Support of Retrophin's Opposition to Lesley Zhu's Untimely Motion to Quash and Cross-Motion For an Order to Show Cause Why She Should Not Be Held In Contempt for Violation of Fed. R. Civ. P. 45 ("Bowman Decl."), Exhibit G. [redacted] If Spring could not enter the market for any of these reasons, it lacks an injury-in-fact traceable to the Defendants' conduct, and therefore lacks Article III standing. However, Prinston has refused to provide any documents reflecting the reasons for its decision to stop work on Spring's project or to state its reasons on the record. A

[2] Spring has engaged a CDMO to conduct manufacturing activities but has not been able to [redacted], something that it is required to do in order to obtain expedited FDA approval. Spring had approached Prinston to perform that work but Prinston declined.

deposition of Zhu is therefore critical (and far from the "fishing expedition" Prinston proclaims it to be). *See* Non-Party Lesley Zhu's Motion to Quash the Subpoena Ad Testificandum and to Transfer the Motion to Quash Pursuant to Fed. R. Cib. P. 45(F) ("Mot."), pp. 1, 8.

On May 13, 2019, Retrophin, pursuant to Federal Rule of Civil Procedure 45, properly issued to Prinston a Document Subpoena for the production of documents to be produced on June 3, 2019. Bowman Decl., Exhibit B. Prinston ignored the Document Subpoena, failing to raise any objections within 14 days as Rule 45 requires (indeed, failing ever to make any written objections to the subpoena), and then failing to produce the requested documents.

Having received no response of any kind from Prinston and in light of evidence obtained from Spring, on June 17, 2019, Retrophin served Zhu with a Deposition Subpoena at her home in San Clemente, California for a deposition scheduled to take place within 100 miles at Cooley LLP's offices in Santa Monica, California on June 28, 2019. Bowman Decl., Exhibit C. This followed several unsuccessful attempts to serve Zhu in New Jersey, where Prinston's headquarters are located, and where Retrophin was able to successfully serve the Document Subpoena.

On June 19, 2019, counsel for Retrophin[3] and counsel for Prinston spoke by phone, during which Retrophin's counsel explained that Zhu's testimony is highly relevant to the question of Spring's Article III standing and offered to accommodate her schedule in setting-up the deposition. Retrophin's counsel reiterated this by email to Prinston's counsel the same day. Bowman Decl., Exhibit E. Prinston's counsel did not respond or acknowledge this email.

On June 20, 2019, counsel for Retrophin offered a solution to potentially avoid Zhu's deposition, suggesting that Prinston could respond to the Document Subpoena

[3] Zhu asserts that Retrophin's counsel, Philip Bowman of Cooley LLP, is also counsel for Mr. Shkreli in the underlying action. This is incorrect. As all the pleadings in the underlying action clearly state, Mr. Bowman is counsel for Defendant, Retrophin.

and that review of those produced documents, which would include internal communications at Prinston, may obviate the need for Zhu's deposition. Bowman Decl., Exhibit F.

On June 24, 2019, *five days later*, counsel for Prinston finally responded, stating that Prinston would only produce the exact same documents already produced by Spring and asserting, implausibly, that Prinston has no internal documents discussing Spring. Bowman Decl., Exhibit H. He also stated his belief that Zhu had no knowledge related to the issue of standing (as he personally understood the relevant inquiry) and that she therefore would not appear for her court ordered deposition. *Id.*

In response, also on June 24, 2019, Retrophin's counsel reiterated it would "endeavor to make the deposition scheduled for this Friday as short as possible in an effort not to inconvenience Ms. Zhu," Bowman Decl., Exhibit G, but also confirmed that the deposition would proceed unless and until "a court of competent jurisdiction rule[d] otherwise," Bowman Decl., Exhibit I.

Despite having made the decision (at least) three days earlier (and likely even before that) that she would not appear for her scheduled deposition, on June 27, 2019, *the evening before* the scheduled deposition, at one minute before 5:00 pm Pacific Time, and after counsel for Retrophin had already traveled to Los Angeles from New York to take the deposition, Zhu filed the instant motion to quash. Zhu did not provide Retrophin with copies of its filed papers until mid-morning the following day less than two hours before the scheduled start time for the deposition.[4]

On June 28, 2019, Zhu did not appear for her court-ordered deposition. Bowman Decl., Exhibit N.

[4] Prinston's counsel stated in its certificate of service that it was serving its papers on Retrophin counsel through the United States Postal Service, notwithstanding that it was the night before the scheduled deposition. Prinston's counsel did not provide copies of the exhibits it filed under seal until July 1—four days after Zhu filed the motion.

ARGUMENT

I. ZHU'S UNTIMELY MOTION TO QUASH SHOULD BE DENIED.

This Court should deny Zhu's motion to quash for two reasons. First, Zhu's eleventh hour motion reflects improper gamesmanship designed to prevent Retrophin from receiving relevant court-ordered discovery and should be denied as untimely on that basis alone. Second, Zhu's motion fails on the merits because she has not come close to demonstrating that complying with the Deposition Subpoena would cause her undue burden.

A. Zhu's Motion To Quash Should Be Denied Because It Is Untimely.

As explained above, Zhu deliberately waited until the close of business the evening before her scheduled deposition to file her motion to quash. This was done in an obvious attempt to grant to herself the very relief that she seeks from the Court. Her filing of the motion plainly did not absolve her of the obligation to attend her deposition, as detailed below. (Part II.) But her gamesmanship in deliberately waiting until the last possible moment to file her motion, ensuring that it could not be rejected before the scheduled deposition, and in the hopes of running out the discovery clock, is also a basis to deny the motion to quash.[5] Indeed, courts routinely reject precisely this "Rambo" style litigation tactic. *Caraway v. Chesapeake Exploration LLC*, 269 F.R.D. 627, 628 (E.D. Tex. 2010).

For example, in *Allstate Ins. Co. v. Nassiri*, the district court affirmed the magistrate judge's finding that the motion to quash was untimely because the non-party had three weeks' notice of the deposition but waited until three days before the deposition to file the motion. 2011 WL 4905639, at *1 (D. Nev. 2011); *see also Ellison v. Ford Motor Co.*, 2009 WL 10665410, at *1 (N.D. Ga. 2009) ("As an initial matter, the Court observes that it is not at all impressed by Plaintiffs' counsel's

[5] Zhu's delay tactics are particularly egregious because after Retrophin properly served the Deposition Subpoena on Zhu, there was no procedural step it could take to enforce compliance. It had to wait until Zhu filed a motion to quash or failed to appear for her deposition before it could seek court intervention.

decision to wait until 3:55 p.m. on April 29, 2009, to file a Motion to Quash a deposition scheduled for May 1, 2009. Defendant filed its notice of deposition for Mr. Bowser on April 14, 2009, and Plaintiffs' counsel has offered no excuse for waiting fifteen days to file a Motion to Quash, much less for filing the Motion on the virtual eve of the deposition. Certainly, Plaintiffs' counsel knew shortly after receiving the notice of deposition what objections he planned to raise in response to the notice. Under those circumstances, waiting until very nearly the last minute to file a Motion to Quash is unacceptable.").

Similarly, in *Nationstar Mortg. LLC v. Flamingo Trails No. 7 Landscape Maint. Ass'n*, the court granted a motion to compel and for sanctions against a witness who had filed a protective order the weekend before a Monday deposition, nearly two weeks after service of the deposition notice, holding that "a party is not empowered to grant itself, *de facto*, the relief it seeks from the Court by delaying in filing a motion...and [t]he odor of gamesmanship is especially pronounced in the context of discovery disputes where it appears parties routinely seek to delay their discovery obligations by filing [a] motion for protective order on the eve of a ... noticed deposition." 316 F.R.D. 327, 336 (D. Nev. 2016) (internal citation and quotation omitted); *see also Caraway*, 269 F.R.D. at 628 (E.D. Tex. 2010) (criticizing the filing of a motion for protective order the evening before a deposition because "[s]uch tactics, dredged up from the cesspool of 'Rambo' litigation, cannot be countenanced" and are an improper attempt to "present an opponent with a *fait accompli*").

Indeed, courts have found that where a witness is "aware of the subpoena[] but inexplicably failed to take action; to find the motion timely under these circumstances would render the timeliness requirement meaningless." *Avila v. Cate*, 2014 WL 508551, at *3 (E.D. Cal. 2014); *see also Barnes v. Madison*, 79 F. App'x 691, 707 (5th Cir. 2003) ("Barnes had received notice of the deposition on May 8, yet she did not file her motion for a protective order until May 17, the Friday preceding her Monday morning deposition. Given the timing, Barnes could hardly have expected in

good faith to receive a court order excusing her attendance. Therefore, we cannot say that the district court abused its discretion in finding that Barnes's failure to appear was not substantially justified."); *Cardoza v. Bloomin' Brands, Inc*., 141 F. Supp. 3d 1137, 1143 (D. Nev. 2015) ("When an attorney knows of the existence of a dispute and unreasonably delays in bringing that dispute to the Court's attention until the eleventh hour, the attorney has created the emergency situation and the request for relief may be denied outright."); *see also Caraway*, 269 F.R.D. at 628 (E.D.Tex.2010) ("Plaintiffs' counsel waited until 5:59 p.m. the day before the depositions were scheduled to file their motion…Had this motion been filed earlier, the court could have considered a number of factors to determine a means of deposing these witnesses that would be the most convenient and cost-effective for all parties involved.").

As the Ninth Circuit has explained, "Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition...[or] seek to adjourn the deposition until an order can be obtained." *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964). Rather than doing so, Zhu's counsel engaged in "Rambo litigation," in the hopes that the dispute would not be resolved before discovery closes and her deposition would never occur. *See Caraway*, 269 F.R.D. at 628 (E.D. Tex. 2010).

This willful attempt to deprive a party of discovery is improper and should not be countenanced by this Court.[6]

[6] There is evidence that Zhu's conduct in response to the subpoena has been influenced by or coordinated with Spring. For example, Spring's counsel sent Zhu a letter suggestion that any response to the Document Subpoena would likely be "duplicative" of documents produced by Spring and threatening that if she "elected" to produce documents Spring was entitled to review them first. Bowman Decl., Exhibit D. Zhu was also in contact with Spring's counsel about the Deposition Subpoena but her counsel has declined to disclose those communications to Retrophin, even though they are plainly not privileged. *See* Bowman Decl., Exhibit J.

B. Zhu's Motion To Quash Should Be Denied Because She Fails to Establish Undue Burden or Any Other Basis to Quash.

A movant seeking to quash a subpoena bears the burden of proving a subpoena is unduly burdensome. *See Soto v. Castlerock Farming & Transp., Inc.*, 282 F.R.D. 492, 504 (E.D. Cal. 2012). This "burden is a heavy one." *In re Yassai*, 225 B.R. 478, 484 (Bankr. C.D. Cal. 1998); *see also U.S. v. Johnson Controls, Inc.*, 2008 WL 4601430, at *2 (C.D. Cal. 2008) ("[A] strong showing is required before a party may be denied the right to take a deposition."). Zhu fails to meet that burden and her motion should be denied.

Zhu has not demonstrated that the Deposition Subpoena imposes any significant burden on her, much less one that is undue. Zhu first claims she was not given adequate notice of the deposition. That assertion is utterly baseless. As an initial matter, Zhu never indicated prior to filing her untimely motion that she would have any difficulty in attending the deposition on the scheduled date, and indeed, counsel for Retrophin repeatedly made clear to her counsel that the deposition could take place on a different date if necessary. *Supra*, p. 7. In any event, Zhu's citation of *Free Stream Media Corp. v. Alphonso Inc.*, No. 17-cv-02107, 2017 U.S. Dist. LEXIS 202594, at *12 (N.D. Cal. Dec. 8, 2017) is not on point. That case addresses *subpoenas for documents* rather than testimony.

Zhu cites *no* authority for the proposition that she did not receive adequate notice, particularly in light of the facts here. Spring did not disclose Prinston's involvement with Spring until a month into the jurisdictional discovery period (which is only 90 days), on May 10, 2019. *Three days* after it learned of Prinston's involvement, on May 13, 2019, Retrophin promptly served its Document Subpoena on Prinston. Prinston ignored that subpoena, neither serving objections within 14 days as required under Rule 45 nor producing documents. Following Prinston's failure to comply with the Document Subpoena, Retrophin promptly started making attempts to serve Zhu with a deposition subpoena in New Jersey, where Prinston is headquartered

and where Prinston accepted service of the Document Subpoena. After failed attempts of service in New Jersey, Retrophin was able to successfully serve Zhu in California on June 17. The suggestion that Retrophin was somehow dilatory is thus utterly baseless.

Zhu also argues that "preparing and sitting for a deposition is always a burden" and she cannot be expected "to drop everything within eleven days of being served . . . and to travel hours to sit for an unnecessary deposition." Mot., p. 11. But that is not the standard. The question is whether there is an "undue burden." Fed. R. Civ. P. 45(d). "[A] slight inconvenience does not constitute undue burden," *Ret. Bd. of Policemen's Annuity & Benefit Fund of City of Chicago v. Bank of N.Y. Mellon,*, 2013 WL 12139833, at *4 (C.D. Cal. 2013); *see also L.A. Idol Fashion, Inc. v. G&S Collection*, 2011 WL 13217298, at *2 (C.D. Cal. 2011) ("[W]hile any witness who is served with a subpoena suffers some discomfort by its very nature, such burden is not an *undue* one, and uncomfortableness, especially resting on speculation, cannot trump the paramount interest of seeking the truth[.]"); *S.E.C. v. Fuhlendorf*, 2010 WL 3547951, at *3 (D. Colo. 2010) (noting that "Fed. R. Civ. P. 45 contemplates that third parties may be subject to some inconvenience in responding to subpoenas.").

In any event, Zhu never asserted *any* burden, including traveling to the deposition, and Retrophin offered to accommodate Zhu to try to alleviate any burden. If there is in fact some burden on Zhu due to the place or time of the deposition, Retrophin was (and is) willing to accommodate her.

Finally, Zhu claims that the Subpoena amounts to a "fishing expedition" and that she has no relevant knowledge or "anything to add." Mot., pp. 8-9. But it is not for Zhu to decide what is and is not relevant. Pursuant to Rule 26, parties may generally seek discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Deposition discovery rules are "accorded a broad and liberal treatment" and it is uncontroverted that "the time-honored cry of 'fishing expedition' serves to preclude a party from inquiring into the

facts underlying his opponent's case" but "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *U.S. v. Johnson Controls, Inc*., 2008 WL 4601430, at *2 (C.D. Cal. 2008) (quoting *Hickman v. Taylor*, 329 U.S. 495, 506-507 (1947)).

And, critically, as discussed in detail above and below, documents Spring has produced indicate that Zhu has relevant (and highly material) knowledge to the question of Spring's Article III standing. *Supra*, pp. 5-6; *infra* p.14. Indeed, Zhu's own declaration essentially concedes the relevance of her testimony. Notably, Zhu does not deny that Prinston had identified a source of samples, and says nothing about whether Spring sought to obtain them. Rather, she says only that Prinston "never obtained samples of Thiola for bioequivalency testing purposes because the project was never pursued." Declaration of Lesley Zhu in Support of Motion to Quash, Dkt. 1-2, ¶ 17. She also states in conclusory fashion that Prinston's decision not to pursue the project had "nothing to do with" Spring's capabilities, *see id.* at ¶ 12, but particularly given that Prinston has refused to produce any documents reflecting its decision, Retrophin is not required to accept these bare assertions and should be permitted to test the extent of her knowledge and recollection through a deposition.

As this Court has noted, "[i]t is very unusual . . . to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Perfect 10, Inc. v. Google Inc*., 2010 WL 11523912, at *1 (C.D. Cal. 2010) (quoting *Salter v. Upjohn Co*., 593 F.2d 649, 651 (5th Cir. 1979)). Zhu has not identified any significant hardship caused by attending and testifying at a deposition.

Finally, any inconvenience to Zhu is greatly outweighed by Retrophin's need for her testimony.

A motion to quash should be denied where "the value of the information to the serving party" is greater than "the burden to the subpoenaed party." *Moon v. SCP Pool Corp*., 232 F.R.D. 633, 637 (C.D. Cal. 2005). Evidence produced to date

indicates that Zhu's testimony is highly relevant to Retrophin's argument that Spring lacked Article III standing. As detailed *supra*, there are two central and related issues, both of which Zhu has unique and potentially dispositive information on: (1) whether Spring was unable to obtain the samples of Thiola it says it needed to obtain FDA approval, and (2) whether Spring would or could have entered the market for generic Thiola. *Supra*, p. 5. Significantly, if Spring could have obtained samples from another source, Spring plainly was not injured by the defendants' conduct and does not have Article III standing. Similarly, if Prinston concluded that developing a generic Thiola was prohibitively expensive, that fact would be highly material to whether Spring could have entered the market and therefore to whether it had constitutional standing to bring its claims. Thus, evidence about the nature of Spring's negotiations with Prinston over the possibility of developing that very same drug may bear directly on whether Spring can carry its burden of showing Article III standing.

Accordingly, Zhu's motion is not only untimely, but meritless, and should be denied.

II. ZHU SHOULD BE ORDERED TO SHOW CAUSE WHY SHE SHOULD NOT BE HELD IN CONTEMPT.

Under Rule 45, a nonparty may be commanded to "attend and testify" at a deposition "within 100 miles of where the person resides, is employed, or regularly transacts business." Fed. R. Civ. P. 45(a)(1)(iii), 45(c)(1)(a). Although issued by attorneys, subpoenas are "issued on behalf of the Court and should be treated as orders of the Court." *Bademyan v. Receivable Mgmt. Servs. Corp*., 2009 WL 605789, at *2 (C.D. Cal. 2009) (internal quotation and citation omitted). As a result, according to Rule 45(e), the court issuing a subpoena "may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena." Fed. R. Civ. Proc. 45(g) (formerly 45(e)).

The law is well settled that "[u]nless a party or witness files a motion for a

protective order and seeks and obtains a stay *prior* to the deposition, a party or witness has no basis to refuse to attend a properly noticed deposition." *In re Toys R Us-Delaware, Inc. Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 2010 WL 4942645, at *3 (C.D. Cal. 2010) (compiling cases); *see also Anderson v. Abercrombie & Fitch Stores, Inc.*, 2007 WL 1994059, at *8 (S.D. Cal. 2007) ("[A] motion to quash must be not only made but *granted* before the scheduled deposition to excuse compliance[.]") (internal citation and quotation omitted).

The Ninth Circuit has clearly articulated this requirement:

> Counsel's view seems to be that a party need not appear if a motion … is on file, even though it has not been acted upon. Any such rule would be an intolerable clog upon the discovery process. Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. …But unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains. Otherwise, as this case shows, a proposed deponent, by merely filing motions under Rule 30(b), could evade giving his deposition indefinitely. Under the Rules, it is for the court, not the deponent or his counsel, to relieve him of the duty to appear.

Pioche Mines Consol., Inc., 333 F.2d at 269 (9th Cir. 1964); *see also* Cal. Practice Guide: Fed. Civ. Pro. Before Trial ¶ 11:1166 (The Rutter Group 2010) ("A party served with a deposition notice or discovery request must obtain a protective order … before the date set for the discovery response or deposition. The mere fact that a motion for protective order is pending does not itself excuse the subpoenaed party from making discovery[.]").

Here, Zhu was properly and personally served with the Deposition Subpoena at her home in San Clemente, California on June 17, 2019, for a deposition scheduled to take place within 100 miles, at Cooley LLP's offices in Santa Monica, California on June 28, 2019. Instead of engaging in proper procedure to seek to preclude her deposition, Zhu deliberately waited until the close of business the evening before her scheduled deposition to file a motion to quash. *Supra*, p. 8. She then granted herself

the requested relief and failed to attend the deposition.

Once it is established that an individual failed to comply with a subpoena, "the burden shifts to the contemnor to demonstrate that he or she took every reasonable step to comply, and to articulate reasons why compliance was not possible." *Bademyan*, 2009 WL 605789, at *2 (citing *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983)). In assessing whether an individual has "adequate excuse" for noncompliance, the key inquiry is whether he or she has taken "all reasonable steps within their power to insure compliance with the court's orders." *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992) (emphasis added) (internal citation and quotation omitted).

Zhu took no steps, let alone reasonable steps, to comply with the subpoena. She does not have adequate excuse for non-compliance. *See*, *e.g.*, *Barnes*, 79 F. App'x at 707 (5th Cir. 2003) ("Barnes had received notice of the deposition on May 8, yet she did not file her motion for a protective order until May 17, the Friday preceding her Monday morning deposition. Given the timing, Barnes could hardly have expected in good faith to receive a court order excusing her attendance. Therefore, we cannot say that the district court abused its discretion in finding that Barnes's failure to appear was not substantially justified."). The consequences of her disregard are clear: "failure to comply with [the] subpoena without adequate excuse is a contempt of court." *Ceremello v. City of Dixon*, 2006 WL 2989002, at *2 (E.D. Cal. 2006).

CONCLUSION

For the foregoing reasons, Retrophin respectfully requests that this Court deny Zhu's Motion to Quash and order Zhu to appear and testify at a deposition at Cooley LLP, 1333 2nd St, Suite 400, Santa Monica, CA 90401, at a date ordered by the Court, or at such time and place as may be agreed by the parties, and to show cause, as promptly as the Court's schedule allows, as to why the Court should not hold Zhu in contempt for her failure to abide by a Rule 45 subpoena.

Dated: July 2, 2019

/s/ Randall R. Lee

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